



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 20, 1996

Ms. Sandra C. Joseph
Open Records Counsel/Disclosure Officer
Texas State Comptroller's Office
111 East 17th Street
Austin, Texas 78774

OR96-2152

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33574.

The Comptroller's Office (the "Comptroller") received a request for the master and auxiliary personnel files of an employee of the Comptroller. You assert that the information may be excepted from public disclosure under sections 552.103, 552.101, and 552.117 of the Act.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The Comptroller has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The Comptroller must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982).

You state that an employee was terminated and, after the termination, representatives of the Comptroller met with the ex-employee's representative. During this meeting, the representative stated several times that he and the ex-employee had consulted with an attorney and a lawsuit challenging her termination would be filed. Additionally, you state that in an October 28, 1994 meeting with Kaye Schultz, Assistant Attorney General, the ex-employee stated

she had hired an attorney and intended to file a lawsuit against the Comptroller pursuant to 42 U.S.C. § 1983.

It is well established that where a requestor has publicly stated on more than one occasion an intent to sue, these threats alone do not trigger section 552.103. Open Records Decision No. 331 (1982). *See also* Open Records Decision No. 351 (1982), Open Records Decision No. 452 (1986). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Other than several public declarations of an intent to sue on the part of the ex-employee and her representative (whom we presume is not an attorney), you have provided this office no evidence, such as correspondence from an attorney threatening litigation, to show that litigation is reasonably anticipated.¹ Thus, you have not met your burden in establishing the likelihood of litigation in this particular instance.²

You next contend certain portions of the information may be excepted from disclosure under 552.101 as information made confidential by another statute, and you have marked that information accordingly. Provisions of the Tax Code prohibit the disclosure of information obtained, secured, or derived from an examination of a taxpayer's books, records, papers, officers or employees. Tax Code §§ 111.006, 151.027. You state that portions of the files contain information which was obtained, secured or derived during the course of audits of the taxpayers' businesses. We agree that the Comptroller must redact the information in the files that is protected under sections 111.006 and 151.027 of the Tax Code.

You also note that 552.117 of the Act excepts from disclosure the home address and home telephone number of a state employee who has chosen not to allow public access to that information under 552.024 of the Act. Because the employee whose records are being sought has chosen not to allow public access, you assert you are required to delete such information from the records at issue. You also state your belief that records containing the employee's past addresses and telephone numbers should also be withheld under 552.117 because such information could be used to determine the employee's current address and telephone number. We agree. In Open Records Decision No. 622 (1994), this office stated:

... we believe that the governmental interests protected by section 552.117(1)(A) would be disserved if it were construed to preclude a governmental body from guaranteeing the confidentiality of a home address or telephone number of an employee who happens to have moved or changed telephone numbers.

¹You also assert the ex-employee has made two previous requests for information regarding the complaint filed against her and the investigation of the complaint. This fact does not rise to the level of concrete evidence that litigation may ensue. We would further note that governing bodies must treat all requests for information uniformly without regard to the position or the occupation of the person making the request. *See* Gov't Code § 552.223.

²We understand the requestor has not filed a lawsuit against the Comptroller as of November 5, 1996.

For these reasons, we conclude that the legislature, in enacting section 552.117(1)(A), intended to include former home addresses and telephone numbers in the phrase "information relating to the home address or home telephone number" of a public employee. Therefore, we conclude that public employees' former addresses and telephone numbers are protected from required public disclosure under section 552.117(1)(A).

Accordingly, you must redact any information revealing the employee's current or former home addresses and telephone numbers before releasing the requested information.

Finally, we note certain documents submitted to this office contain the social security numbers of state employees. Federal law may prohibit the disclosure of these individuals' social security numbers.³

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 33574

Enclosures: Submitted documents

³A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994). Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.